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No. 78-408

In the Supreme Court of the United States

OCTOBER TERM, 1978

MARIE AND DONALD DUCHARME, PETITIONERS

v.

MERRILL-NATIONAL LABORATORIES and
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioners argue that the Swine Flu Act, 42 U.S.C. 247b(j)-(*l*), is unconstitutional because it abrogates common law remedies and, by substituting the United States as a defendant, deprives them of a right to a jury trial. The district court rejected these arguments in an opinion on which we largely rely (Pet. App. 2a-9a), and the court of appeals affirmed on the basis of the district court's opinion (Pet. App. 1a).[1]

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[1]Every other court that has considered the question has sustained the constitutionality of the Swine Flu Act. See *Jones* v. *Wyeth Laboratories, Inc.*, Civ. No. 77-2059 (W.D. Ark. Jan. 6, 1978), aff'd, No. 78-1238 (8th Cir. Sept. 20, 1978); *Wolfe* v. *Merrill National Laboratories*, 433 F. Supp. 231 (M.D. Tenn. 1977); *Stephens* v. *Wyeth Laboratories, Inc.*, Civ. No. 77-0274-S (N.D. Ala. June 3, 1977); *Sparks* v. *Wyeth Laboratories, Inc.*, 431 F. Supp. 411 (W.D. Okla. 1977), appeal docketed, No. 77-1409 (10th Cir.).

The Swine Flu Act was designed to make the program of swine flu vaccinations of 1976 possible. Because of the uncertain risks involved in administering the vaccine and defending lawsuits, the potential producers of the vaccine were unable to obtain adequate liability insurance. Congress solved that problem by providing that the United States would be liable for any personal injury or death caused by the program of vaccinations, and that the remedy against the United States would be exclusive. The Act requires adherence to the procedures established for the administration of the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*

Petitioners commenced this action against a manufacturer of swine flu vaccine, and the United States moved to substitute itself as a defendant. It also moved to dismiss the action, because petitioners had not complied with the procedures specified in the Federal Tort Claims Act. The district court granted the motion of the United States and dismissed the action.

Petitioners' argument that the Swine Flu Act violates the Due Process Clause of the Fifth Amendment by abrogating a common law tort and substituting a statutory cause of action is insubstantial. This Court upheld a similar substitution last Term. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, No. 77-262 (June 26, 1978), slip op. 22-32. Here, as in *Duke Power*, a right of action against a private party has been replaced by a right of action against the United States. Here, as in *Duke Power*, the substitute action is roughly equivalent to the common law tort remedy. It preserves a right to full recovery, and the substitution of the United States as the defendant guarantees that any judgment debt will be paid. The Constitution would not be offended by total abolition of a common law right,[2] and so it cannot

[2]See, *e.g.*, *Silver* v. *Silver*, 280 U.S. 117, 122 (1929); *Duke Power*, *supra*, slip op. 26 n.32.

be offended by a change that substitutes one defendant for another.

Petitioners cannot argue, moreover, that any right they enjoyed was abolished by the Swine Flu Act. Petitioner Marie Ducharme received the vaccine only after the statute had been passed and therefore had no vested rights or expectations that any previous legal rule would govern subsequent actions for damages.

Petitioners' further argument that the Swine Flu Act violates the Seventh Amendment—because jury trials are not available in suits against the United States—is frivolous. It is routine for new statutory causes of action to be adjudicated by tribunals in which juries do not sit. See, *e.g.*, *Atlas Roofing Co.* v. *OSHC*, 430 U.S. 442 (1977). Workers' compensation schemes, which replaced common law tort actions, are administered by bodies that do not have juries. And in *Duke Power*, *supra*, the statutory cause of action in the event of nuclear accident was to be administered without a jury. Juries are not required in litigation against the United States, see *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962), and they are therefore unnecessary under the Swine Flu Act.[3]

[3]Petitioners urge that the Act is discriminatory because it provides that manufacturers of vaccine are entitled to a jury trial in case the United States may bring suit to recover the indemnity that is permitted in some instances. See 42 U.S.C. 247b(k)(7). But the difference is justified by a difference in the procedural posture of the parties. In the instant suit the United States is a defendant, and the absence of a jury trial makes the procedures consistent with those under the Tort Claims Act. In a suit for an indemnity, the manufacturer would be the defendant, and the provision for a jury trial in such cases conforms to the norm that private defendants are entitled to jury trials when the United States (or anyone else) is the plaintiff.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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